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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAFAEL ASTORGA-TORRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(I) Whether the evidence, seized by federal agents in a warrantless search of Petitioner's motel room many hours after Petitioner had been arrested and taken from the motel room, was admitted into evidence at trial in violation of Petitioner's Fourth Amendment right against unreasonable searches and seizures and in direct contradiction with the decisions of this Court in **Mincey v. Arizona**, 537 U.S. 385, and **Stoner v. California**, 376 U.S. 483.

(II) Whether the Court's error in giving the **Jewell** instruction, which the Ninth Circuit held erroneously invited the jury to find that Petitioner was in constructive possession of the heroin possessed by Ambriz, and required reversal of his conviction of Count II

permeated the jury's finding of guilt on Count I and denied Petitioner his Fifth Amendment right to due process of law?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, RAFAEL ASTORGA-TORRES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 26, 1982.

A Petition for Rehearing was denied and the suggestion for Rehearing en banc was rejected by the United States Court of Appeals for the Ninth Circuit on September 20, 1982.

OPINIONS BELOW

A copy of the Ninth Circuit Court of Appeals original opinion filed on March 15, 1982, is attached as Appendix "A". The order of the Court of Appeals requesting Appellants' specific response to Appellees' Petition for Rehearing is attached as Appendix "B". The order of the Court of Appeals denying Rehearing, withdrawing the March 15, 1982, opinion and superseded by the July 26, 1982, opinion is attached as Appendix "C". This superseding opinion is attached as Appendix "D". Lastly, the order of the

Court of Appeals denying Appellants' Petition for Rehearing and Suggestion for Rehearing en banc is attached as Appendix "E".

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit became final when the Petition for Rehearing was denied and Suggestion for Rehearing en banc was rejected on September 20, 1982. This Court's jurisdiction is invoked under Title 28, United States Code, §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> "[No person shall] be deprived of life, liberty, or property, without due process of law . . ."

The Fourth Amendment to the Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, . . ."

STATEMENT OF THE CASE

On June 19, 1980, a federal grand jury for the Eastern District of California indicted defendants, Jose Inez Ambriz-Ambriz (hereinafter referred to as Ambriz), petitioner Rafael Astorga-Torres, (hereinafter referred to as Rafael), and Jesus Torres-Torres (hereinafter referred to as Jesus).

Petitioner Rafael was charged in four counts:

(1) That commencing on or about June 11, 1980 he conspired to distribute heroin.

(2) Count Two (2) of the indictment charged the petitioner with possession with intent to distribute heroin on or about June 11, 1980.

(3) Count Three (3) of the indictment charged the petitioner with assult on federal officers with a deadly weapon.

(4) Count Four (4) of the indictment charged petitioner with the unlawful carrying of a firearm during the commission of a felony.

On June 23, 1980, petitioner Rafael and Jesus entered pleas of not guilty to all counts of the indictment. At a later date, prior to the trial, co-defendant Ambriz entered a guilty plea to the indictment.

On August 22, 1980, petitioner's Motion to Supress Evidence was denied.

Prior to trial the court conducted a hearing to rule on the admissibility of evidence found in the septic tank and ruled that the evidence was admissible.

Throughout the jury trial the petitioner made timely objections to the admissibility of certain evidence and testimony.

On November 24, 1980, at the close of the government's case, petitioner made a motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, which motion was denied. (Reporter's Transcript [R.T.] 1367.)

On November 24, 1980, the Court ruled on the use of various jury instructions to which the petitioner made timely objections.

On November 25, 1980, the jury found the petitioner guilty as charged in all counts of the indictment.

On January 19, 1981, petitioner was sentenced to the custody of the Attorney General on Counts I and II and to a concurrent period of twelve years with a six year special parole term, and on Counts III and IV to a concurrent period of three years, to run consecutive to Counts I and II. The petitioner was therefore sentenced to a total period of fifteen years.

On January 19, 1981, petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals.

On March 15, 1982, a panel of the Ninth Circuit Court of Appeals reversed petitioner's conviction of Counts I and

II and remanded the case for a new trial.

On March 27, 1982, the government filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On May 21, 1982, a panel of the Ninth Circuit directed petitioner to respond to the issue of whether a certain statement was inadmissible hearsay.

On July 26, 1982, the same three judge panel of the Ninth Circuit expressly reversed its own opinion of March 15, 1982. The court withdrew its March 15, 1982 opinion, affirmed petitioner's conviction of Counts I, III and IV and reversed petitioner's conviction of Count II.

On August 12, 1982, petitioner filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On September 20, 1982, the Ninth Circuit Court of Appeals denied this Petition and rejected the Suggestion for Rehearing en banc.

STATEMENT OF FACTS

I. Motion To Supress

On August 22, 1980, the Court heard petitioner's Motion to Supress. The government admitted that there was no search warrant obtained for the search of the motel room.

The testimony at the hearing demonstrated that on May 3, 1980, and May 14, 1980, Ambriz, by himself, made hand-to-hand sales of heroin to government agents (R.T. 173-175).

On June 10, 1980, Ambriz told undercover agent Delgado that he was going to make another sale of heroin to him on

June 11, 1980, and that he may bring some guards (R.T. 176). It was, in effect, stipulated that the source of the heroin to Ambriz was an "old man" from Sinoloa, Mexico and therefore not the defendant Jesus or petitioner Rafael (R.T. 194-195).

On June 11, 1980, government agents conducted a surveillance of Ambriz's residence in South Gate, California. Agent Quander testified that on the morning of June 11, 1980, he observed Ambriz alone drive his green Mustang from his residence to the Weatherby Gun Shop and back twice (R.T. 32, 33.). He was then seen driving to a hardware store and back to his residence alone. He was observed leaving his residence again and was lost in traffic. The officers next saw him driving his

Mustang with a passenger identified as defendant Torres. They went to a parking lot near a 7-11 store where they parked. Rafael went over to a blue Camero where he met Jesus. Rafael and Jesus took the Camero and got gas. Ambriz was seen going into the Tri City Gun Shop and purchasing some shells. Later the two cars, with Ambriz in the green Mustang and Rafael and and Jesus in the Camero, were observed driving up Interstate 5 to Tulare County.

Agent Quander testified that at this point they did not have probable cause to obtain an arrest or search warrant (R.T. 43).

Agent Plavan testified that at around 3:00 p.m. on June 11, 1980, the Mustang and the Camero pulled into the parking lot of the Sky Ranch Motel in Tulare

(R.T. 47-48). Ambriz checked into Room 7 and Jesus and Rafael checked into Room 4. Rafael was seen taking a paper bag out of the Camero and bringing it into Room 4, then bringing it back out to the Camero, and then back into Room 4 (R.T. 47).

Agent Delgado testified that Ambriz called them and told him that he was staying in Room 7 (R.T. 178). He testified that the plan was that he would test the heroin in Room 7 (R.T. 178).

Agent Plavan testified that just prior to 5:00 p.m. he went to the motel office and told Mr. Raga, the manager/owner, that they were investigating a narcotics case (R.T. 49-50). At that time he obtained the manager's consent to enter Rooms 4 and 7 (R.T. 51, 132).

Agent Delgado testified that about 5:00 p.m. he met Ambriz alone in the parking lot of the motel. He asked Ambriz where the heroin was and Ambriz told him it was in his room (Room 7). Ambriz went to room 7 and came out with a bag, showed him the heroin, and Delgado walked to his car, ostensibly to get the money (R.T. 180). Agent Delgado then took off his hat which was the prearranged arrest signal, and Ambriz was arrested and taken into custody outside the motel in the parking lot (R.T. 182).

At this point several (which at trial it was determined to be approximately 15) state and federal officers converged on Room 4, banging on the door and yelling in Spanish and English that they were federal police (R.T. 52). About thirty seconds later an officer thought

he heard a clicking sound of a gun inside the room. They immediately kicked in the door, and a gun battle ensued (R.T. 52-54). After approximately ten minutes a tear gas canister was shot at the room and the officers observed the weapons being thrown out of the room (R.T. 55). The petitioner Rafael came out of the room with his hands up (R.T. 55). He had been seriously wounded in the gun battle. He came out, laid face down on the pavement, was arrested and was taken into custody in the parking lot outside the motel room (R.T. 55, 65, 88). Thereafter, Jesus crawled out of the motel room and collapsed on the pavement. He was arrested and taken into custody in the parking lot (R.T. 55, 56, 65.). Jesus was seriously injured in the gun battle (R.T. 88, 156).

It should be noted that at trial it was shown that the officers feared that Jesus was going to die (R.T. 345-346). Both were secured and subsequently taken to a hospital for emergency care.

Agent Plavan testified that he arrested Jesus and Rafael for distribution of heroin and conspiracy to distribute heroin based upon the information that they had been "involved" with Ambriz in the Los Angeles area (R.T. 65).

Agent Delgado testified that they had been advised that there were only three suspects total -- Ambriz, Jesus and Rafael (R.T. 197).

Agent Plavan testified that after he arrested and secured Jesus and Rafael, in the parking lot outside of the hotel, that he entered Room 4 (R.T. 84). As he entered the room Agent Hendrix yelled to

him that all was clear (R.T. 95). He testified that as he understood it, Agent Hendrix had preceded him and had secured the room (R.T. 84). It should be noted that at the trial in this matter Agent Hendrix testified that he had gone into Room 4 and found that there was no one in there and that he said it was secure (R.T. 366, 954).

Agent Plavan then entered the hotel room which he described as being one large room and a bath (R.T. 61). He testified that he visually inspected the main room, walked into the bathroom and heard and saw water running full in the sink. At that time he inspected the toilet bowl and found torn papers, documents and currency. These documents included the drivers' licenses of Rafael and Jesus, a wallet and miscellaneous

money and pictures. He reached into the toilet bowl and put the documents on top of the toilet (R.T. 56). He testified that he did not seize anything at that time (R.T. 90).

Much later that night, without any warrant, the agents returned to the room and searched it and seized the documents in the bathroom and photographed the room (R.T. 191). The next day the agents obtained a search warrant for the automobiles and found nothing (R.T. 101-102, 192).

At the conclusion of the hearing the petitioner's Motion to Suppress the documents found in the toilet bowl in Room 4 was denied. The court stated that it denied the motion on the grounds that the manager consented to the search

and that it was incident to the arrest of the appellants (R.T. 214).

The Ninth Circuit Court of Appeals upheld the denial of petitioner's Motion to Suppress (Appendix "D", Op. at p. 4). The Court found that Agent Plavan's initial warrantless entry into the motel room was proper (Op. at p. 4). The Court reasoned that this entry was justified as a protective search for additional dangerous persons, to guard against threat of fire created by the tear gas canister and to prevent destruction of evidence (Op. at p. 5). Further, the agents could later return without a warrant to retrieve the documents seized from the toilet during the earlier "justifed" entry, because "there was no further prejudicial intrusion upon [petitioner's] privacy, especially

in light of [his] clear abandonment of the seized items." (Op. at p.6.)

II. The Trial

The government's theory of the case was that Ambriz had brought fifteen (15) ounces of heroin with him to the motel, that he delivered seven (7) ounces to Agent Delgado and left the other eight (8) ounces with Jesus and Rafael in Room 4. Further, that Jesus and Rafael initiated a gun battle with the agents for the purpose of destroying the contraband and flushed the "missing" eight (8) ounces down the toilet.

The government offered the following evidence in an effort to prove that Jesus and Rafael actually possessed the eight (8) ounces of heroin which Ambriz

was supposed to, but did not, deliver on June 11.

Ambriz had told the Agent Delgado that he would sell him fifteen (15) ounces of heroin on June 11 at $3,300.00 per ounce for $49,500.00.

On June 10 he told Delgado that he would bring guards with him (R.T. 190-210.) but that the transaction would be with him alone (R.T. 198-199). However on June 11 he handed Agent Delgado a bag containing only 7 condoms each holding one (1) ounce of heroin (R.T. 239-242). A motel brochure was found in Room 7 with the figures seven (7) times thirty-three (33) and at the bottom a total of $49,500.00 (R.T. 1072-1076, 705-745).

These numbers corresponded to the volume Agent Delgado was to receive and the price he was to pay on June 11.

The evidence against petitioner at most showed that he was associated with Ambriz but in no way supported that he knew Ambriz possessed heroin or possessed it himself. The only evidence regarding the petitioner was that he was observed briefly speaking with a lady and Ambriz in the yard of the Ambriz residence on May 14, 1980 (R.T. 397) and that he drove up to the Sky Ranch Motel with Ambriz and Jesus on June 11, 1980, and checked into Room 4 with Jesus. All of the drug transactions and conversations were with and by Ambriz alone.

As the trial court observed there was no proof prior to June 11 that a conspiracy existed, i.e. that anyone other than Ambriz was knowingly involved in the sale of the heroin. Further, as the trial court noted, the evidence at the

end of the government's case at most suggested that on June 10, a conspiracy was about to be formed because of Ambriz's June 10 statement that he was going to bring guards with him (R.T. 1283-1286). Ambriz repeatedly stated that the transaction was to be with him alone (R.T. 198-199, 212).

A vast majority of the testimony during the three week trial related to the May 3 and May 14 heroin transactions between Ambriz and the agents prior to June 11, 1980. These events occurred prior to the alleged date of the conspiracy, without any demonstrated involvement or presence of the petitioner. Over petitioner's objection, the Court admitted into evidence the heroin purchased from Ambriz on May 3, May 14 and June 11 and denied petitioner's motion

to strike testimony regarding the acts and declarations of Ambriz prior to June 11 (R.T. 1269, 1322).

Agent Delgado testified that on May 3, 1980, he and Agent Camarena met with Ambriz alone and had a conversation with him in which they purchased an ounce of heroin from him for $3,350.00 (R.T. 173-175). He testified that at that time he told Ambriz that if they liked the heroin they "would get in contact with him, and probably order up some more." (R.T. 175.) The condom of heroin he received on May 3, 1980, was identified by the witness (R.T. 176).

Agent Delgado testified that after May 3, 1980, he had additional conversations with Ambriz (R.T. 178). He testified that on May 14, 1980, he purchased two ounces of heroin from Ambriz alone

for a total of Sixty-six Hundred Dollars ($6,600.00) (R.T. 178). He then identified the heroin purchased on that date (R.T. 179).

He testified that between May 14 and June 11, 1980, he had several conversations with Ambriz negotiating the delivery of heroin (R.T. 183). He testified that they spoke about the purchase of thirty ounces of heroin for $99,000.00 (R.T. 183-184).

The court agreed with the petitioner that the statements or conduct of Ambriz made prior to the formation of the alleged conspiracy were not admissible against petitioner (R.T. 1288-1289). Further, that there was no way the prosecutor could tie Jesus or Rafael to the May 3 transaction (R.T. 1288-1289). The court ultimately ruled that the evidence

was admissible against Jesus and Rafael on the grounds that it was relevant to the case and that it tended to establish a "course of conduct" by Ambriz (R.T. 1327). Accordingly, the Court gave a limiting instruction (R.T. 1498-1501).

The government's comments during argument on the admissibility of Ambriz's conduct and statements reveal that without this evidence "all [the government had] is seven ounces of heroin and some heroin found in condoms in the septic tank." (R.T. 1291, lines 16-19; see below.)

The prosecutor argued that the acts and declarations of Ambriz prior to June 11, 1980, were necessary to prove that "Jesus and Rafael were members of the conspiracy to distribute heroin on June 11, that Jesus and Rafael were in

possession of heroin with the intent to distribute it, and that Jesus and Rafael initiated a gun battle with the agents for the purpose of disposing of the contraband." (R.T. 1314.)

The government offered the following evidence to show that Jesus and Rafael had flushed the "missing" eight (8) ounces down the toilet.

Approximately two months after the arrest of Jesus and Rafael, federal agents pumped out one of the septic tanks of the motel and found twelve (12) condoms. Three of these were saved and admitted into evidence at trial. Two of the condoms were partially torn and had knots on the end (R.T. 253-258). The third condom had some liquid and substance in it (R.T. 251-252).

The condoms were analyzed and the partially torn condoms contained no controlled substance. The one condom with the substance in it was analyzed and found to contain heroin of seven percent (7%) purity (R.T. 842-844). The heroin seized from Ambriz on June 11 was found to be fourteen percent (14%) pure (R.T. 830-837). The chemist testified that the liquid from the septic tank in the condom would lower the percentage of purity of the heroin (R.T. 842).

There were several septic tanks at the motel and room 4 and other rooms flushed into the septic tanks where the evidence was found. Room 7 and other room flushed into other tanks (R.T. 695).

The evidence showed that the heroin seized from Ambriz on June 11, 1980, was

tied in Trojan condoms with a date of 1-80, that the two partial condoms found in the septic tank were Trojan condoms dated 12-79 and that the "full condom" was a Trojan condom but that you could not read the date. All that could be seen was the number 9 (R.T. 844-847). Mr. Brenner of Young's Rubber Corporation, who manufacture Trojan condoms, testified that a Trojan condom dated 12-79 would probably reach the market by February, 1980, but not before December, 1979 (R.T. 641-7).

The documents found in the toilet of Room 4 were analyzed and the chemical acetylmorphine was found on them (R.T. 848-849). The chemist testified that acetymorphine can be formed by the breaking down of heroin when mixed with water (R.T. 852).

Rafael was seen walking out to the Camero and picking up a brown paper bag and walking into Room 4 and then back out to the car with the bag and back into the room (R.T. 491-496). No brown paper bag was found in Room 4 (R.T. 1250).

During the trial, this testimony was thoroughly impeached. The testimony at trial revealed that by the time the septic tank was pumped by the agents in August, 1980, it had not been emptied for almost a year (R.T. 700). Mr. Raga, the motel manager, testified that the eight toilets for Rooms 1, 2, 3, 4, 30, 31, 32 and 33 flush into the subject septic tank (R.T. 701). He testified that between the period of January, 1980, and August, 1980, alone the rooms had been rented out to various people

for two hundred and twenty-one (221) days (R.T. 704). There were times when people would rent these rooms for only a few hours and that he gets sort of a "mixed clientele", charging $18.00 to $22.00 per night (R.T. 753-755). He admitted that during this time he had called the Sheriff's Department to come out to evict people who were not welcome there (R.T. 702). He said that during this ten month period he personally called the police to his motel to kick out people three or four times (R.T. 763).

The testimony of Agent Delgado revealed that when he pumped out the tank in August, 1980, two months after the arrest of appellants, he found and took at least twelve other condoms (R.T. 254, 269.). He testified that there were

still others that could have gone through the screen and not been caught (R.T. 281). He testified that he looked at these condoms and threw out all but the three he saved for evidence (R.T. 254). He was not sure if the condoms he discarded were Trojan condoms and didn't note the dates of any of them (R.T. 273). He testified that he discarded them because he did not think they were important because they were not tied at the top (R.T. 254). Appellants moved to dismiss on the grounds of destruction of evidence and the motion was denied (R.T. 282).

Mr. Brennen of the Young Drug Products Corporation, who manufacture Trojan condoms, testified that his company manufactured approximately twelve million Trojan condoms in December, 1979,

and that twenty percent are distributed in the west (R.T. 654-663). He testified that it is possible for a 12-79 condom to reach a retail market after a January, 1980, condom (R.T. 662).

Mr. James A. Heagy, a forensic chemist for the U.S. Department of Justice, Drug Enforcement Administration, was called by the prosecution (R.T. 830). He testified that he analyzed some of the papers which were found in the motel room toilet and found that there was a very small "trace" of acetylmorphine on some of the papers (R.T. 850, 873). He testified that acetylmorphine can be chemically formed with heroin breaks down but that he could not say that the trace of acetylmorphine found on the paper was from any heroin in the toilet and could not tell when, or if, the

papers had come in contact with heroin (R.T. 854). He testified that normally heroin would break down into acetylmorphine quickly, after a period of days it would be all gone, and he did not get the papers until after the state laboratory had analyzed them (R.T. 861).

Stephen John O'Clair of the California Department of Justice, Fresno Regional Laboratory, testified that he analyzed the documents on June 20, 1980, before they went to Mr. Heagy of the D.E.A (R.T. 879). He testified that he examined the papers under a stereomicroscope looking for any kind of powder residue and did not find any. He found some powder residue in the wallet but the tests he ran were negative for any drugs. He testified that, in his opinion, if papers were dumped into a toilet

with heroin, it would leave a microscopic residue and that there was none present on the subject papers when he examined them (R.T. 889-890).

The state chemist also testified that when he examined the papers, he placed them on a work bench, which, over the years, had contained heroin and that it is possible that the fibers of the papers would have absorbed the heroin on the work bench (R.T. 893).

It should be noted that although Agent Plavan testified that he thought the water in the toilet in Room 4 was brown when he saw it, Detective Diaz, who was in charge of the crime scene investigation and who was assigned the task of observing, marking and preserving the evidence, testified that the

water in the toilet was clear (R.T. 522, 1222, 1263).

The government seemed to point out the fact that the petitioner had been seen carrying a paper bag into Room 4 and that the bag was not found by the agents in the room, thereby implying that it was flushed down the toilet with the drugs. However, no bag or remnants of a bag was found in the septic tank. Agent Diaz did testify that he found discarded paper bags when he was searching the parking lot area (R.T. 1266).

Agent Rodriguez testified that he is able to detect the odor of heroin and that if there was a large amount of heroin in that room, even if completely sealed in rubber condoms, he could smell it as soon as he walked through the door (R.T. 1155, 1166).

No one testified that they detected any smell of heroin in Room 4. No one testified that they saw petitioner at any time have, hold or dispose of any heroin. No one testified that they heard the sound of a flushing toilet from Room 4 at any time from the time the officers announced their presence to the time of the arrest.

The court denied petitioner's motion for judgment of acquittal pursuant to Rule 29 as to Counts I - IV (R.T. 1367).

III. Jewell Instruction

Over the objection of the petitioner, the Court ruled that it would give the following instruction based upon the holdings in the cases of **United States v. Jewell**, 532 F.2d 911, and **United States v. Valle Valdez**, 554 F.2d 911:

"If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County, but you find that the defendant was present to guard Ambriz-Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the Indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz-Ambriz was going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz-Ambriz was to sell some heroin. Thus, actual or positive knowledge is not necessary to convict the accused if he was subjectively aware of a high probability of the crucial fact, namely, that Ambriz-Ambriz was to sell some heroin, even though he consciously or deliberately disregarded that probability in an effort to remain ignorant of the fact." (R.T. 1506.)

The petitioner argued that the instruction was not applicable and highly prejudical since (1) neither appellant took the stand, and there was no evidence that they ever denied anything; (2) there was no evidence that pointed

in the direction of deliberate ignorance; and (3) this instruction has not been applied nor should be applied to the facts present before this Court (R.T. 1395-1397).

The Court not only proceeded to give this instruction to the jury, but emphasized its importance by reading the instruction twice, stating in between each reading, "I am going to read this to you again -- because it's -- you've got to deal with this instruction carefully and deliberately." (R.T. 1505-1506.) At the conclusion of the trial the petitioner was found guilty on all counts.

The Ninth Circuit found that the court erred in giving the **Jewell** instruction and this error was far from

harmless. The court reversed petitioner's conviction of Count II (the substantive possession count), but affirmed petitioner's conviction of Count I (conspiracy to distribute heroin). (Appendix "D", Op. at p. 10.)

REASONS FOR GRANTING THE WRIT

I. THE EVIDENCE SEIZED BY FEDERAL AGENTS IN A WARRANTLESS SEARCH OF PETITIONER'S MOTEL ROOM, MANY HOURS AFTER PETITIONER HAD BEEN ARRESTED AND TAKEN FROM THE ROOM, WAS ADMITTED INTO EVIDENCE AT TRIAL IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES, AND THE DECISION OF THIS COURT IN MINCEY V. ARIZONA, 537 U.S. 385 AND STONER V. CALIFORNIA, 376 U.S. 483 (1964).

The Ninth Circuit erroneously held that the subsequent search of the petitioner's motel room, without a warrant,

many hours after Jesus' and the petitioner's arrest, was justified on the theory that the petitioner abandoned the seized items when arrested (Appendix "D", Op. at p. 6). This holding is contrary to the overwhelming weight of authority. See, **Eng Fung Jem v. United States**, 281 F.2d 803 (9th Cir. 1960); **United States v. Agapito**, 620 F.2d 324 (2d Cir. 1979); **Mincey v. Arizona**, 437 U.S. 385 (1978); **Stoner v. California**, 376 U.S. 483 (1964).

There is no question that petitioner had a right to privacy in his motel room. In **Eng Fung Jem v. United States**, **supra**, state and federal officers conducted a warrantless search of appellant's motel room and seized the drugs. In reversing the conviction, the court stated:

> "Surely the guarantee of the Fourth Amendment may not be compromised by nice distinctions as to the length of time a defendant remains as a guest of the hotel at which he is stopping. The right of privacy must be accorded with equal vigor both to transient hotel guests and to occupants of private, permanent dwellings."
> **Eng Fung Jem v. United States, supra, at 805.**

It should be noted that this right to privacy is not forfeited or waived merely because there was a shootout during a narcotics raid. See, **Mincey v. Arizona, 437 U.S. 385, 391 (1978).**

It is well-settled that a person has a reasonable expectation of privacy in a motel room that cannot be relinquished by a motel clerk. **Eng Fung Jem v. United States, supra; Stoner v. California, supra.**

Neither can the search be justified, as the Ninth Circuit held, as a "security check" in order to insure that no additional persons or danger was within (Appendix "D", Op. at p. 5). The police could not have reasonably believed that additional dangerous persons were present. Cf. United States v. Gardner, 627 F.2d 906, 911 (9th Cir. 1980). Jesus and Rafael had been under constant surveillance for many hours, the agents clearly knew and were in fact advised that there were only three suspects involved (Ambriz, Rafael and Jesus) (R.T. 197), and at no time did the agents hear or see anyone in the room other than Jesus and Rafael who, by the time of entry, were under arrest.

As in United States v. Agapito, 620 F.2d 324, 336 (2d Cir. 1980), the

"security check" exception to the warrant requirement is inapplicable. In Agapito, the agents' constant surveillance for two days indicated the room was empty; the agents at one point looked through the open door and never saw or heard anyone in the room other than the appellants who were under arrest at the time of the entry.

Moreover, in the present case, Officer Hendrix had checked the room and told Agent Plavan that all was clear before Agent Plavan entered the room. (R.T. 84, 366, 954) Thus, there was no reason for Agent Plavan to enter and search the room.

Contrary to the Ninth Circuit's holding, Agent Plavan's entry was not reasonable to guard against preserving evidence from possible destruction. At

the time of the arrest, the officers had every reason to believe that Ambriz alone had all the drugs in Room 7. Ambriz had previously told the agents that the drugs were in Room 7 and in fact went to Room 7 to get the drugs. There was no reason to believe that any of the drugs were in Room 4.

Petitioner submits that the search and seizure of evidence in Room 4 did not fall within any recognized exception to the warrant requirement.

ARGUMENT

It is well-established that evidence obtained by a federal officer as a result of an illegal search and seizure is inadmissible into evidence in a federal prosecution. The exclusionary rule extends to any evidence obtained as a

result of information or leads received or secured by means of an unreasonable search and seizure. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).

It is also settled law that a warrantless search can survive constitutional inhibition only upon a showing that it comes within a recognized exception to the rule that a search must rest upon a search warrant; e.g., if the search is contemporaneous with an arrest and confined to the vicinity thereof, or that a search is made with consent. In our case, since there was no search warrant, and the burden thus fell upon the government to establish that the search falls within some exception to the warrant requirement. Stoner v.

California, 376 U.S. 483, 486 (1964); **Jones v. United States**, 357 U.S. 493, 499 (1958); **United States v. Mapp**, 476 F.2d 67 (2nd Cir. 1973); **Agnello v. United States**, 269 U.S. 20 (1925); **Jeffers v. United States**, 342 U.S. 48, 51 (1951).

The petitioner respectfully submits that there was no probable cause to arrest the petitioner or to search the bathroom. As set forth in the statement of facts herein, Agent Quander admitted that at the time the petitioner was seen driving to Tulare, they had no probable cause to arrest him. There was nothing that the petitioner did subsequent to that time which would have provided sufficient cause to arrest him for conspiracy to distribute heroin or possession of heroin. All the petitioner did

was check into motel Room 4 and was seen carrying a bag into the room. At the time of the arrest, the officers had every reason to believe that Ambriz alone had all the drugs in Room 7 and there was no reason to believe that any of the drugs were in Room 4. Ambriz had previously told the agents that the drugs were in Room 7 and in fact went to Room 7 to get the drugs.

At the time the officers attempted to arrest the petitioner, the only information known to them was that the petitioner had been in the company of Ambriz. Mere association with Ambriz and presence on the scene is not sufficient to find that they were in possession of contraband. **Arellanes v. United States**, 302 F.2d 603, 606 (9th Cir. 1962);

United States v. Camacho, 528 F.2d 464 (9th Cir. 1976).

Should this Court decide, however, that there was probable cause to arrest the petitioner, it is well established that a finding of probable cause cannot of itself justify a search without a search warrant. Johnson v. United States, 333 U.S. 1068, 92 L.Ed. 436 (1948); Eng Fung Jem v. United States, 281 F.d 803 (9th Cir. 1960).

Petitioner contends that the trial court erred in finding that the search was not justified by the consent of the motel manager. It is well-settled that a motel clerk does not have the authority to give consent to a police search of a guest's room. Stoner v. California, supra, See also, Chapman v. United States, 365 U.S. 610 (1961), (landlord

has no authority to consent to search of tenant's rented premises).

Finally, petitioner respectfully submits that the search and seizure cannot be justified as incident to the lawful arrest of petitioner.

In the landmark case of **Chimel v. California**, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the United States Supreme Court held that a search incident to a lawful arrest made without a warrant can extend only to areas within the defendant's immediate control which was construed to mean the area from which he might gain possession of a weapon or destructible evidence. The court clearly stated in that case that there is no justification for searching rooms other than that in which the arrest occurred pursuant to the arrest.

In **Vale v. Louisiana**, 399 U.S. 30, 90 S.Ct. 1969 (1970), the court held that a "search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest'".

In **Vale**, the appellant was arrested on the front steps of the premises immediately after the arresting officers had observed a sale of narcotics. The court held that a warrantless search of the house was illegal and could not be justified as a search incident to an arrest, stating that if the search is to be upheld as incident to the arrest, the arrest must take place inside the house, not somewhere outside -- whether two blocks away, twenty feet away or on the sidewalk near the front steps. The

search must be constitutionally confined to the area within the arrestee's reach at the time of his arrest. Vale v. Louisiana, supra, citing Chimel v. California, supra.

In the matter before this Court, both Jesus and Rafael were arrested outside of the motel room in the parking lot. They had been seriously wounded, were totally secured and in custody in the parking lot before the officers entered the motel room. Although the officers knew there were only two possible suspects that had been in the room, Officer Hendrix secured the room and advised Agent Plavan that all was clear. It was only after all was secured that Agent Plavan went into the motel room and discovered the documents in the toilet. Even then, he did not seize the

evidence. It was not until approximately midnight that night, long after both Jesus and Rafael were in custody at the hospital, did the agents go back into the motel room and seize the documents. This search and seizure, without warrant, can hardly be said to have occurred contemporaneously with the arrest of petitioner and Jesus in an area within their immediate control.

The petitioner respectfully contends that there was no reason why the officers should not have been required to obtain a warrant.

For all of the foregoing reasons, the motion to suppress should have been granted.

II. THE COURT'S ERROR IN GIVING THE JEWELL INSTRUCTION, WHICH THE NINTH CIRCUIT HELD ERRONEOUSLY INVITED THE JURY TO FIND THAT PETITIONER WAS IN CONSTRUCTIVE POSSESSION OF THE HEROIN POSSESSED BY AMBRIZ, AND REQUIRED REVERSAL OF HIS CONVICTION OF COUNT II, PERMEATED THE JURY'S FINDING OF GUILT ON COUNT I, AND DENIED PETITIONER HIS FIFTH AMENDMENT RIGHT IN DUE PROCESS OF LAW.

The Ninth Circuit agreed with petitioner that the trial court erred in giving the Jewell instruction. The district court twice instructed the jury as follows:

> "If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County, but you find that the defendant was present to guard Ambriz-Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the Indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz-Ambriz was

going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz-Ambriz was to sell some heroin. Thus, actual or positive knowledge is not necessary to convict the accused if he was subjectively aware of a high probability of the crucial fact, namely, that Ambriz-Ambriz was to sell some heroin, even though he consciously or deliberately disregarded that probability in an effort to remain ignorant of the fact." (R.T. 1506.)

The Ninth Circuit properly found that the **Jewell** instruction was not appropriate in this case where the petitioner did not claim lack of knowledge and no facts pointed in the direction of deliberate ignorance. (Op. at.p.9); **United States v. Erwin**, 625 F.2d 838 (9th Cir. 1980); **United States v. Maretta-Bejanno**, 552 F.2d 1323, 1325 (9th Cir. 1977). The Ninth Circuit articulated the prejudice suffered in this case.

"A given here, the instruction invited the jury, if unable to

> conclude that appellants had been in actual possession of the eight ounces of heroin, to find that they were in constructive possession of the seven ounces possessed by Ambriz. To find such constructive possession, the instruction required the jury to find only that appellants knew, or should have known, that Ambriz had heroin he planned to sell. Yet we have held that '(m)ere proximity to the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession."
> **United States v. Batimana**, 623 F.2d 1366, 1369 (9th Cir.) cert. denied, 499 U.S. 1038 (1980).

Because the government's case as to the actual possession was not without its elements of doubt, the court's error in instructing the jury as to constructive possession was far from harmless.

The court emphasized the instruction by repeating it twice and telling the jury, "You've got to deal with this instruction carefully and deliberately."

(R.T. 1505-1506.) It was the only instruction which the court read twice.

The Ninth Circuit found that this error required reversal of Count II (the substantive possession count).

Petitioner contends, as he did before the Ninth Circuit, that the prejudicial error of the **Jewell** instruction not only permeated Count II of the Indictment (the substantive possession count) but also must, of necessity, have permeated the finding of guilt on the conspiracy charge (Count I) since petitioner's knowing possession was, by the prosecutor's own admission, an integral part of the conspiracy charge.

It is well-settled that errors involving an instruction which states an unconstitutional presumption are "harmful per se". See, Vaccaro v. United

States, 461 F.2d 626 at 635 (5th Cir. 1972). "When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict." Chapman v. California, 386 U.S. 18, at 44, 87 S.Ct. 824 at 838, 17 L.Ed.2d 705 at 721-722; Vaccaro v. United States, supra, at 635 (emphasis in original).

In the matter before this Court, the Ninth Circuit properly found that the Jewell instruction erroneously allowed the jury to presume that the petitioner was in constructive possession of the heroin possessed by Ambriz. Based upon this clear error, the Court reversed the possession count. The Court admits that there was doubt in the government's case

as to any actual possession by the Petitioner. Under these circumstances, it is inconceivable that the jury could not have relied upon their erroneous finding of constructive possession in finding the petitioner guilty of conspiring with Ambriz to possess the heroin as alleged in Count I.

Both the trial court and the prosecutor acknowledged that the Jewell instruction applied to Count I as well as to Count II and that the jury could rely on it to find guilt as to both counts (R.T. 1414, 1415). This Court cannot be assured that the jury did not decide Count II first and then after having used erroneous criteria to find possession did not use the finding of joint possession to conclude that the Petitioner had also conspired to possess and

distribute the heroin. This monumental error as well would require a reversal of the judgment on Count I.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ALVIN S. MICHAELSON

Attorney for Petitioner
RAFAEL ASTORGA-TORRES

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1063

RAFAEL ASTORGA-TORRES,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1064
USDC NO. CR 80-104

JESUS TORRES-TORRES,

Defendant-Appellant.

FILED: March 15, 1982
Clerk, U.S. Court of Appeals

OPINION

Appeal from the United States District Court Eastern District of California
Hon. Thomas J. MacBride, Presiding
Argued and Submitted:
November 9, 1981

Before: MERRILL and KENNEDY, Circuit Judges, and KING, * Chief District Judge

MERRILL, Circuit Judge

Appellants have been convicted of conspiracy to distribute heroin, Count I; possession with intent to distribute heroin, Count II; assault with deadly weapons upon special agents of the Drug Enforcement Agency (DEA), Count III; and, carrying of a firearm during commission of a federal narcotics felony, Count IV. On this appeal, they assign error in many respects.

The incidents giving rise to the criminal charges occurred on June 11, 1980 at a motel near Tulare, California. The motel was the rendezvous established

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* Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.

by DEA agents and appellants' co-defendant, Jose Ambriz-Ambriz, for a narcotics sale by Ambriz. While under surveillance of DEA agents, Ambriz and appellants in two cars had traveled to Tulare from the Los Angeles area. At the motel, Ambriz was assigned cabin 7 and appellants cabin 4. The arrangements with Ambriz had been for the sale of fifteen ounces of heroin on June 11 and fifteen ounces on June 12. The price was to have been $3,300 per ounce. Outside cabin 7, Ambriz produced a brown paper bag for inspection by Agent Delgado. Delgado satisfied himself that the bag contained heroin and then gave a signal on which Ambriz was placed under arrest by other agents. The bag contained only seven ounces of heroin, each ounce packaged in a condom bearing the

date 12/79 and stamped "Trojan." Later investigation revealed no additional heroin in cabin 7, but a scrap of paper was found there with calculations: 8 X 3300 totaling 26,400; 7 X 3300 totaling 23,100. The two products were summed for a total of 49,500 - the agreed dollar price for the fifteen ounces of heroin.

After Ambriz had been arrested, the agents knocked at the door of cabin 4, identified themselves, and demanded entrance. There was no response. This had continued for about a minute when an agent at the front door heard a clicking sound which he took to be the cocking of a firearm. The door was then kicked in and the agents found themselves confronted by one of the appellants with a revolver. He fired at the agents who

responded with a shotgun wounding the appellant. This initiated a sporadic exchange of gunfire through the door and bathroom window, Finally a tear gas cannister was fired into the room and appellants surrendered; threw out their guns; and, came out with hands up.

Agent Plavan entered the cabin, satisfied himself that no one else was in it and observed the extensive damage done by the shootout. In the bathroom, the basin faucet was running at full power and the toilet bowl was filled with debris including a wallet and papers. Agent Plavan removed the debris and placed it on top of the toilet tank to dry. There was no sign of the paper bag. The cabin was sealed and placed in control of local officers. Later that night a DEA agent returned and retrieved

the material that had been found in the toilet bowl.

The motel cabins were connected to four septic tanks, with cabins 4 and 7 connected to different tanks. On August 8, 1980, agents had the septic tank serving cabin 4 and three other cabins opened and pumped out. Approximately twelve condoms were recovered. One was tied at the end and appeared to be full of substance. Two were tied at the end but were torn below the knot and were empty. All three were stamped "Trojan." The two torn condoms bore the date 12/79. The date on the full condom was illegible. These three condoms were received in evidence at the trial. The others were discarded.

Ambriz pleaded guilty to five counts of the indictment, including Counts I

and II. Appellants pleaded not guilty and were tried before a jury.

At the trial, a government expert testified to chemical analysis of the contents of the full condom and of the documents recovered from the toilet bowl. He testified that the condom contained heroin and that the documents gave evidence of having been in contact with heroin.

Agent Delgado testified as to two prior drug transctions with Ambriz: purchases of one ounce on May 3, 1980 in Fresno, and of two ounces on May 4, 1980 in Tulare County. On each occasion, the heroin had been packaged in Trojan condoms. On the latter occasion, Ambriz had been observed by another agent to have met with one of the appellants before leaving the Los Angeles area for

Tulare. Agent Delgado testified that in making arrangements for the June 11th sale, Ambriz had stated that he was going to bring someone to guard him.

The government's theory was that appellants were knowing parties to a conspiracy to sell heroin and had been in actual possession of the balance of the fifteen ounces that was the subject of the June 11 sale and had flushed it down the basin and the toilet during the course of the gun fight.

Appellants' defense was that they knew nothing of the narcotics sale and never had knowing possession of any narcotics.

Motion to Suppress

Appellants sought to suppress the documents recovered from the toilet bowl

on the ground that they were the product of an unlawful warrantless search. They assign as error the court's denial of their motion. We find no error. Since the documents were in plain view once Agent Plavan had entered the cabin the only question is whether his entry into the cabin was proper under the circumstances. We hold that it was.

We note first that the agents had probable cause to suppose that appellants were parties to Ambriz's proposed sale; were in possession of the missing eight ounces of heroin; and were subject to arrest. They had traveled to Tulare in close company with Ambriz and had been observed to be in contact with him at the motel. They had been observed in possession of a paper bag similar to the one in Ambriz's possession containing

seven ounces of heroin. Ambriz had stated that he intended to bring guards. Clearly these "facts and circumstances . . . were sufficient to warrant a prudent man in believing that the petitioner[s] had committed or [were] committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). It was then proper for the agents to demand entry into appellants' cabin after identifying themselves in order to place appellants under arrest.

Further it was proper for Agent Plavan to enter the cabin following the shootout. While the presence of anyone else in the cabin was most unlikely, cf. United States v. Gardner, 627 F.2d 906, 911 (9th Cir. 1980) (protective search of premises permissible when officers reasonably believe additional dangerous

persons may be present), officers who have been subjected to pistol fire from the front door and bathroom window can hardly be said to be acting unreasonably when they take steps to make sure of their safety. "Courts must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger." United States v. Coates, 495 F.2d 160, 165 (D.C. Cir. 1974). Agent Plavan's entry into the cabin was also reasonable to guard against any threat of fire created by the tear gas cannister and to preserve any evidence from possible destruction. Cf. Michigan v. Tyler, 436 U.S. 499, 510 (1978) (fire official's prompt inspection of burned building justified to discover continuing dangers

and to preserve evidence from destruction). This is especially true here where the agents had reason to believe appellants were in possession of heroin -- a substance particularly susceptible to destruction. (As an example had the material in the toilet bowl not been removed, any indication that the bowl had once contained heroin might well have been lost.) Further it would seem the act of responsible peace officers to take note of the extent of property damage resulting from a shootout which they and their agency might well be called on to justify.

Once lawfully inside the cabin, it was proper for the agent to seize any evidence which he observed in plain view. Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971).

Appellants also contend that regardless of the validity of the initial cabin check, it was improper for the agents without warrant to return to the cabin to retrieve the documents laid out to dry. We disagree. In retrieving what had already, in effect, been properly seized there was no further prejudicial intrusion upon appellants' privacy, especially in light of their clear abandonment of the seized items. We conclude that it was not error to deny suppression of the material found in the toilet bowl.

Appellants also sought to suppress the condoms found in the septic tank on the ground that any connection this evidence had to them was so tenuous as to render the evidence irrelevant. We disagree. The likelihood that anyone

else may have found it necessary during the relevant time span to flush down the toilet condoms containing or apparently having contained contraband is, in our view, sufficiently remote to render the evidence relevant. Its weight as proof was for the jury to determine.

Prior Acts and Declarations of Ambriz

Appellants contend that testimony concerning drug sales and statements made by Ambriz prior to the existence of any conspiracy between him and appellants was inadmissible hearsay. As to the earlier drug sales, we note that Ambriz by his nonverbal conduct in consummating the transactions clearly did not intend an assertion. Accordingly evidence of the prior sales was not hearsay and there is no need to bring it

within a hearsay exception. See Rule 801, Fed.R.Evid. The evidence was relevant as an indication of Ambriz's modus operandi. As to Ambriz's earlier statements, only his comment that he intended to bring guards with him to Tulare was really prejudicial. That statement could properly be admitted in a preliminary hearing before the judge to establish that the agents had probable cause to suppose that appellants were parties to the action and subject to arrest. However, upon the issue of guilt of conspiracy the statement was inadmissible as hearsay since it was made prior to the existence of any conspiracy so far as the record has established. The judge acknowledged this state of the record, but nonetheless invited the jury to find that such a conspiracy existed,

and instructed that if they did so find they might consider the statement for any purpose. We agree with appellants that this constituted reversible error.

Jewell Instruction

Count II charged appellants with possession of heroin with intent to distribute it in violation of 21 U.S.C. § 841(a)(1). As we have noted, the Government's theory was that appellants were in actual possession of the eight ounces of heroin that was not found to be in Ambriz's possession. The Government did not contend that they also had such a degree of control over the heroin in Ambriz's possession as to be in constructive possession of that heroin as well.

The district court twice instructed the jury as follows:

> If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County but you find that the defendant was present to guard Ambriz-Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz-Ambriz was going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz-Ambriz was to sell some heroin.

This instruction was drawn from **United States v. Jewell**, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976), where it dealt with establishing not the fact of possession but the fact of knowledge under circumstances where it was contended that the defendant had deliberately closed his

eyes to the apparent facts. We have held that the **Jewell** instruction is appropriate only in such circumstances. **United States v. Erwin**, 625 F.2d 838, 841 (9th Cir. 1980). As given here, the instruction invited the jury, if unable to conclude that appellants had been in actual possession of the eight ounces of heroin, to find that they were in constructive possession of the seven ounces possessed by Ambriz. To find such constructive possession, the instruction required the jury to find only that appellants knew, or should have known, that Ambriz had heroin he planned to sell. Yet we have held that "[m]ere proximity to the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession."

United States v. Batimana, 623 F.2d 1366, 1369 (9th Cir.), cert. denied, 499 U.S. 1038 (1980). Because the Government's case as to the actual possession was not without its elements of doubt, the court's error in instructing the jury as to constructive possession was far from harmless.

Miscellaneous Matters

We find no merit in appellants' contention that they were prejudiced by the Government's destruction of the approximately nine condoms found in the septic tank which were not retained as evidence. The requisite prejudice does not appear. See United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974).

Since we remand for a new trial as to Counts I, II and IV, we need not reach

as to those counts the contention of one appellant that he did not receive adequate assistance of counsel. As to the errors and omissions of counsel alleged in relation to Count III, it does not appear appellant was prejudiced by constitutionally inadequate representation. See Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

Conclusion

Judgment on Count III is affirmed. Judgments on Counts I, II and IV are reversed and the case is remanded for new trial.

Re: United States v. Astorga-Torres, No. 81-1063
United States v. Torres-Torres, No. 81-1064

KENNEDY, Circuit Judge, concurring in part and dissenting in part:

Judge Merrill is quite right in holding the statements of Ambriz were before the formation of the conspiracy and, therefore, were inadmissible in the trial of the co-conspirators who are the appellants here. The limiting instruction, as stated, was insufficient to narrow the testimony for any permitted purpose.

I would affirm the conviction on Count I, however, because admission of the statements was harmless error. The appellants were under surveillance while they traveled over one-hundred miles in tandem with Ambriz to the city of sale;

they rented a separate room in the same motel where the transaction was to take place; they began shooting at the agents when first questioned; a search of the room disclosed that they had attempted to destroy evidence; and contraband was subsequently discovered. Under any standard, this is adequate evidence to convict for conspiracy to distribute heroin as charged in Count I.

The case is made difficult by the Government's puzzling insistence, both here and at trial, that the statement of Ambriz was the linchpin of its case. It is understandable that the majority would enter the reversal the prosecution so clearly invites; but the Government is just plain wrong in contending the evidence was critical. I would affirm

Count I. Affirmance of Count IV would then follow.

I fully concur in the court's disposition of the remaining counts.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1063

RAFAEL ASTORGA-TORRES,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1064
USDC NO. CR 80-104

JESUS TORRES-TORRES,

Defendant-Appellant.

FILED: May 21, 1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

ORDER

Appeal from the United States
District Court Eastern District
of California
Hon. Thomas J. MacBride, Presiding

Before: MERRILL and KENNEDY, Circuit Judges and KING, * Chief District Judge

Appellants are directed within 15 days to respond to the Government's Petition for Rehearing with reference to the issue whether Ambriz's statement that he intended to bring guards with him was inadmissible hearsay.

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* Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1063

RAFAEL ASTORGA-TORRES,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1064
USDC NO. CR 80-104

JESUS TORRES-TORRES,

Defendant-Appellant.

FILED: July 26, 1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

Appeal from the United States
District Court Eastern District
of California
Hon. Thomas J. MacBride, Presiding

Before: MERRILL and KENNEDY, Circuit Judges, and KING, * Chief District Judge.

After consideration of the Petition for Rehearing herein and the response thereto, it is ordered that the Opinion heretofore filed on March 15, 1982 is hereby withdrawn and is superseded by the Opinion filed contemporaneously with this Order. Save in the respects in which the superseding Opinion modifies the original, rehearing is denied.

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* Honorable Samuel P. King, Chief United States District Judge District of Hawaii, sitting by designation.

APPENDIX "D"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1063

RAFAEL ASTORGA-TORRES,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1064
USDC NO. CR 80-104

JESUS TORRES-TORRES,

Defendant-Appellant.

FILED: July 26, 1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

OPINION

Appeal from the United States
District Court Eastern District
of California
Hon. Thomas J. MacBride, Presiding
Argued and Submitted: November 9, 1981

Before: MERRILL and KENNEDY, Circuit Judges, and KING, * Chief District Judge

MERRILL, Circuit Judge

Appellants have been convicted of conspiracy to distribute heroin, Count I; possession with intent to distribute heroin, Count II; assault with deadly weapons upon special agents of the Drug Enforcement Agency (DEA), Count III; and, carrying of a firearm during commission of a federal narcotics felony, County IV. On this appeal, they assign error in many respects.

The incidents giving rise to the criminal charges occurred on June 11, 1980 at a motel near Tulare, California. The motel was the rendezvous established

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* Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.

by DEA agents and appellants' co-defendant, Jose Ambriz-Ambriz, for a narcotics sale by Ambriz. While under surveillance of DEA agents, Ambriz and appellants in two cars had traveled to Tulare from the Los Angeles area. At the motel, Ambriz was assigned cabin 7 and appellants cabin 4. The arrangements with Ambriz had been for the sale of fifteen ounces of heroin on June 11 and fifteen ounces on June 12. The price was to have been $3,300 per ounce. Outside cabin 7, Ambriz produced a brown paper bag for inspection by Agent Delgado. Delgado satisfied himself that the bag contained heroin and then gave a signal on which Ambriz was placed under arrest by other agents. The bag contained only seven ounces of heroin, each ounce packaged in a condom bearing the

date 12/79 and stamped "Trojan." Later investigation revealed no additional heroin in cabin 7, but a scrap of paper was found there with calculations: 8 X 3300 totaling 26,400; 7 X 3300 totaling 23,100. The two products were summed for a total of 49,500 - the agreed dollar price for the fifteen ounces of heroin.

After Ambriz had been arrested, the agents knocked at the door of cabin 4, identified themselves, and demanded entrance. There was no response. This had continued for about a minute when an agent at the front door heard a clicking sound which he took to be the cocking of a firearm. The door was then kicked in and the agents found themselves confronted by one of the appellants with a revolver. He fired at the agents who

responded with a shotgun wounding the appellant. This initiated a sporadic exchange of gunfire through the door and bathroom window. Finally a tear gas cannister was fired into the room and appellants surrendered; threw out their guns; and, came out with hands up.

Agent Plavan entered the cabin, satisfied himself that no one else was in it and observed the extensive damage done by the shootout. In the bathroom, the basin faucet was running at full power and the toilet bowl was filled with debris including a wallet and papers. Agent Plavan removed the debris and placed it on top of the toilet tank to dry. There was no sign of the paper bag. The cabin was sealed and placed in control of local officers. Later that night a DEA agent returned and retrieved

the material that had been found in the toilet bowl.

The motel cabins were connected to four septic tanks, with cabins 4 and 7 connected to different tanks. On August 8, 1980, agents had the septic tank serving cabin 4 and three other cabins opened and pumped out. Approximately twelve condoms were recovered. One was tied at the end and appeared to be full of substance. Two were tied at the end but were torn below the knot and were empty. All three were stamped "Trojan." The two torn condoms bore the date 12/79. The date on the full condom was illegible. These three condoms were received in evidence at the trial. The others were discarded.

Ambriz pleaded guilty to five counts of the indictment, including Counts I

and II. Appellants pleaded not guilty and were tried before a jury.

At the trial, a government expert testified to chemical analysis of the contents of the full condom and of the documents recovered from the toilet bowl. He testified that the condom contained heroin and that the documents gave evidence of having been in contact with heroin.

Agent Delgado testified as to two prior drug transactions with Ambriz: purchases of one ounce on May 3, 1980 in Fresno, and of two ounces on May 4, 1980 in Tulare County. On each occasion, the heroin had been packaged in Trojan condoms. On the latter occasion, Ambriz had been observed by another agent to have met with one of the appellants before leaving the Los Angeles area for

Tulare. Agent Delgado testified that in making arrangements for the June 11th sale, Ambriz had stated that he was going to bring someone to guard him.

The government's theory was that appellants were knowing parties to a conspiracy to sell heroin and had been in actual possession of the balance of the fifteen ounces that was the subject of the June 11 sale and had flushed it down the basin and the toilet during the course of the gun fight.

Appellants' defense was that they knew nothing of the narcotics sale and never had knowing possession of any narcotics.

Motion to Suppress

Appellants sought to suppress the documents recovered from the toilet bowl

on the ground that they were the product of an unlawful warrantless search. They assign as error the court's denial of their motion. We find no error. Since the documents were in plain view once Agent Plavan had entered the cabin the only question is whether his entry into the cabin was proper under the circumstances. We hold that it was.

We note first that the agents had probable cause to suppose that appellants were parties to Ambriz's proposed sale; were in possession of the missing eight ounces of heroin; and were subject to arrest, They had traveled to Tulare in close company with Ambriz and had been observed to be in contact with him at the motel. They had been observed in possession of a paper bag similar to the one in Ambriz's possession containing

seven ounces of heroin. Ambriz had stated that he intended to bring guards. Clearly these "facts and circumstances . . . were sufficient to warrant a prudent man in believing that the petitioner[s] had committed or [were] committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). It was then proper for the agents to demand entry into appellants' cabin after identifying themselves in order to place appellants under arrest.

Further it was proper for Agent Plavan to enter the cabin following the shootout. While the presence of anyone else in the cabin was most unlikely, cf. United States v. Gardner, 627 F.2d 906, 911 (9th Cir. 1980)(protective search of premises permissible when officers reasonably believe additional dangerous persons may be present), officers who

have been subjected to pistol fire from the front door and bathroom window can hardly be said to be acting unreasonably when they take steps to make sure of their safety. "Courts must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger." **United States v. Coates**, 495 F.2d 160, 165 (D.C. Cir. 1974). Agent Plavan's entry into the cabin was also reasonable to guard against any threat of fire created by the tear gas cannister and to preserve any evidence from possible destruction. Cf. **Michigan v. Tyler**, 436 U.S. 499, 510 (1978) (fire official's prompt inspection of burned building justified to discover continuing dangers

and to preserve evidence from destruction). This is especially true here where the agents had reason to believe appellants were in possession of heroin -- a substance particularly susceptible to destruction. (As an example had the material in the toilet bowl not been removed, any indication that the bowl had once contained heroin might well have been lost.) Further it would seem the act of responsible peace officers to take note of the extent of property damage resulting from a shootout which they and their agency might well be called on to justify.

Once lawfully inside the cabin, it was proper for the agent to seize any evidence which he observed in plain view. **Coolidge v. New Hampshire**, 403 U.S. 443, 465-66 (1971).

Appellants also contend that regardless of the validity of the initial cabin check, it was improper for the agents without warrant to return to the cabin to retrieve the documents laid out to dry. We disagree. In retrieving what had already, in effect, been properly seized there was no further prejudicial intrusion upon appellants' privacy, especially in light of their clear abandonment of the seized items. We conclude that it was not error to deny suppression of the material found in the toilet bowl.

Appellants also sought to suppress the condoms found in the septic tank on the ground that any connection this evidence had to them was so tenuous as to render the evidence irrelevant. We disagree. The likelihood that anyone

else may have found it necessary during the relevant time span to flush down the toilet condoms containing or apparently having contained contraband is, in our view, sufficiently remote to render the evidence relevant. Its weight as proof was for the jury to determine.

Prior Acts and Declarations of Ambriz

Appellants contend that testimony concerning drug sales and statements made by Ambriz prior to the existence of any conspiracy between him and appellants was inadmissible hearsay. As to the earlier drug sales, we note that Ambriz by his nonverbal conduct in consummating the transactions clearly did not intend an assertion. Accordingly evidence of the prior sales was not hearsay and there is no need to bring it

within a hearsay exception. See Rule 801, Fed.R.Evid. The evidence was relevant as an indication of Ambriz's modus operandi.

As to Ambriz's earlier statements, only his comment that he intended to bring guards with him to Tulare was really prejudicial. That statement was properly admitted as evidence of Ambriz's intent under Rule 803, Fed.R. Evid. 1/ Rule 803 follows the holding in **Mutual Life Insurance Co. v. Hillmon**, 145 U.S. 285, 295-96 (1891), to the effect that a statement of the declarant's intent to do something is competent "not as [a] narrative[] of facts communicated to the [declarant] by others, nor yet as proof that he actually [did as he intended,] but as evidence that * * * he had the intention of [so

doing]." Evidence of that intent can then be considered by the jury in determining whether the declarant subsequently performed the intended act. To the same effect, **United States v. Pheaster**, 544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (applying **Hillmon** before Federal Rules of Evidence were in effect); **United States v. Jenkins** 579 F.2d 840, 842-44 (4th Cir.), cert. denied, 439 U.S. 967 (1978). Here an appropriate limiting instruction wes given. 2/ Accordingly we conclude that Ambriz's statement was properly admitted not as proof that in fact he did bring guards with him to Tulare (or that appellants were those guards) but as evidence that he had the intent to do so, from which evidence inferences could properly be drawn by

the jury. For this purpose the statement was admissible and relevant as to the other defendants. See United States v. Pheaster, supra.

With respect to the same statement of Ambriz, the judge further instructed the jury that if they found that a conspiracy existed between Ambriz and Appellant Astorga-Torres at the time the statement was made, then as to that appellant they could consider the statement "for all purposes" as the declaration of a co-conspirator. 3/ Arguing that the record is devoid of any evidence from which it could be concluded that a conspiracy existed at that time, Appellant Astorga-Torres assigns the giving of this instruction as error. We accept, arguendo, this contention of error but hold it to have been harmless. The line between

use of a statement as proof that the intended act was in fact ultimately performed (improper use) and its use as basis for an inference to that end (proper use) is at best tenuous. Cf. Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir. 1932) (such limiting instructions demand of jury "mental gymnastic[s]"). If indeed the jury understood the instruction as an invitation to take the short step from permissible inference to impermissible deduction, its limited impact was overshadowed by the abundant evidence that appellant was engaged in some sort of joint enterprise with Ambriz - evidence from which it could be inferred that appellant's function in that enterprise was such as to call for him to be armed and ready to use armed force to protect against

intrusion into the affairs to the enterprise. In our view the more probable effect of the instruction, however, was to call the attention of the jury to the fact that Ambriz's statement was not entitled to conclusive weight as proof of anything. Under these circumstances, we conclude that any error in the instruction was harmless.

Jewell Instruction

Count II charged appellants with possession of heroin with intent to distribute it in violation of 21 U.S.C. § 841(a)(1). As we have noted, the Government's theory was that appellants were in actual possession of the eight ounces of heroin that was not found to be in Ambriz's possession. The Government did not contend that they also had

such a degree of control over the heroin in Ambriz's possession as to be in constructive possession of that heroin as well.

The district court twice instructed the jury as follows:

> If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County but you find that the defendant was present to guard Ambriz-Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz-Ambriz was going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz-Ambriz was to sell some heroin.

This instruction was drawn from United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976), where it dealt with

establishing not the fact of possession but the fact of knowledge under circumstances where it was contended that the defendant had deliberately closed his eyes to the apparent facts. We have held that the **Jewell** instruction is appropriate only in such circumstances. **United States v. Erwin**, 625 F.2d 838, 841 (9th Cir. 1980). As given here, the instruction invited the jury, if unable to conclude that appellants had been in actual possession of the eight ounces of heroin, to find that they were in constructive possession of the seven ounces possessed by Ambriz. To find such constructive possession, the instruction required the jury to find only that appellants knew, or should have known, that Ambriz had heroin he planned to sell. Yet we have held that "[m]ere

proximity to the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession." United States v. Batimana, 623 F.2d 1366, 1369 (9th Cir.), cert. denied, 499 U.S. 1038 (1980). Because the Government's case as to the actual possession was not without its elements of doubt, the court's error in instructing the jury as to constructive possession was far from harmless.

Miscellaneous Matters

We find no merit in appellants' contention that they were prejudiced by the Government's destruction of the approximately nine condoms found in the septic tank which were not retained as evidence. The requisite prejudice does not

appear. See United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974).

We find no merit in the contention of one appellant that he did not receive adequate assistance of counsel.

Conclusion

Judgment on Counts I, III and IV is AFFIRMED. Judgment on Count II is REVERSED.

FOOTNOTES

1/ Rule 803 provides:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

"(3) * * * A statement of the declarant's then existing state of mind * * * (such as intent, plan * * *) * * *."

2/ The court instructed:

"These statements [that Ambriz intended to bring persons to guard him and that he intended to sell fifteen ounces of heroin to Delgado on June 11th] were admitted only to show the state of mind or intention of Ambriz at the time he made the statements. The statements * * * are not to be considered by you as evidence that, at the time they were made, these defendants or either of them, by that I mean Rafael and Jesus, were, in fact, his guards or that he had a specific intention to recruit either or both of them as his guards at the time that statement was made, nor were the statements admitted to prove

that, at the time they were made, these defendants or either of them, were in a conspiratorial relationship with Ambriz for the unlawful distribution of heroin.

"The statements may, however, be used by you to assess the conduct of Ambriz after he made the statements and may be considered by you to determine if he carried out his expressed intention to bring guards with him to Tulare on June 11th and did, in fact, have guards with him on that day in the persons of the defendants here on trial.

"The statements may also be used and considered by you to determine if Ambriz carried out his expressed intention to bring, or caused to be brought, to Tulare the fifteen ounces of heroin mentioned in his conversation with Delgado on June 10th."

3/ The court instructed:

"If you persuaded to the required degree of proof that Rafael and Ambriz * * * were in the beginning stages of or were already in a conspiratorial relationship for the sale and distribution of heroin at the time the June 10th statements were made, then you may consider those statements for all purposes in determining the

guilt or innocence of Rafael as to those counts of the Indictment to which you believe the evidence of those statements would be relevant."

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1063

RAFAEL ASTORGA-TORRES,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. C.A. NO. 81-1064

JESUS TORRES-TORRES,

Defendant-Appellant.

FILED: Sept. 20, 1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

ORDER

Before: MERRILL and KENNEDY, Circuit Judges, and KING, * Chief District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Kennedy has voted to reject the suggestion for rehearing en banc. Judges Merrill and King have recommended that the suggestion be rejected.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.